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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

No. [redacted] 124

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MILLERS INDEMNITY UNDERWRITERS, PLAINTIFF IN ERROR, PETITIONER,

vs.

NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD), DEFENDANT IN ERROR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

G. BOWDOIN CRAIGHILL,
HANNIS TAYLOR, JR.,
Attorneys for Millers Indemnity Underwriters, Petitioner.

J. B. MORRIS,
J. AUSTIN BARNES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 502.

MILLERS INDEMNITY UNDERWRITERS, PLAINTIFF IN ERROR, PETITIONER,

vs.

NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD), DEFENDANT IN ERROR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

Your petitioner, Millers Indemnity Underwriters, a mutual reciprocal insurance association, respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the State of Texas entered in the above cause on April 23, 1924. A petition for rehearing was considered by the Supreme Court of Texas and denied on May 21, 1924.

Case Already Pending in This Court on Writ of Error.

This case has already been docketed by petitioner in this Court upon a writ of error allowed by the Supreme Court of Texas and petitioner has filed with the Clerk a certified transcript of the record showing the proceedings had in the Supreme Court of Texas, in the Court of Civil Appeals of Texas, and in the District Court of Orange County, Texas, such record including the opinion of the Supreme Court of Texas. A supersedeas bond has been approved by the Chief Justice of the Supreme Court of Texas and duly filed.

Petitioner believes that this case is already properly before this Court on writ of error, but, to guard against the possibility of this Court deciding otherwise, petitioner also applies for a writ of certiorari under Section 237 of the Judicial Code, as it is apparent from the record that petitioner in this case claimed a right, privilege, or immunity from liability under the Constitution and statutes of the United States and the decision of the Texas Supreme Court was adverse to the privilege, right, or immunity so claimed.

Federal Question Involved.

As more fully set forth in the assignment of errors, petitioner contends that, upon the undisputed evidence, this case is based upon an alleged *maritime tort*, which is cognizable exclusively in a court of admiralty under Article 3, Section 2, of the Constitution of the United States; that the Texas courts had no jurisdiction of this cause under the Texas Workmen's Compensation Law or otherwise; that the Texas Workmen's Compensation law is invalid under the Constitution of the United States in so far as an attempt is made

to apply it to this admiralty or maritime cause of action, and in rendering judgment against petitioner under such law the Texas courts violated the Fourteenth Amendment, as well as Article 3, Section 2, of the Constitution of the United States.

Proceedings in Lower Courts.

This suit was instituted on December 10, 1920, in the District Court of Orange County, Texas, by E. J. Boudreaux, R. J. Boudreaux, Mary M. Boudreaux, and Nellie Boudreaux Braud (the respondent, who is sometimes described as "Mrs. E. J. Braud"), joined *pro forma* by her husband, E. J. Braud, against Millers Indemnity Underwriters (the petitioner) to set aside an award of the Industrial Accident Board of Texas, which had been in favor of petitioner, and to seek compensation for the death of O. O. Boudreaux under the Workmen's Compensation Law of Texas. The original plaintiffs alleged that they were the surviving brothers and sisters of deceased, but at the trial all of the plaintiffs were dismissed from the suit except the respondent, Mrs. E. J. Braud, and her husband, in whose favor judgment was rendered against petitioner for the sum of $5,400, a part thereof being payable at the rate of $15 per week for 268 weeks, under the Compensation Law. The suit was filed against petitioner under certain provisions of the Workmen's Compensation Law of Texas, plaintiffs alleging that petitioner insured decedent's employer, National Shipbuilding Company, against liability to pay compensation in cases coming within the purview of such Compensation Law.

On appeal to the Court of Civil Appeals of Texas, the judgment was affirmed, and later affirmed by the Supreme Court of Texas.

Federal Question Was Properly Raised and Preserved.

Petitioner denied all liability when claim was made by respondent before the Industrial Accident Board. Upon institution of the suit in the District Court of Orange County, Texas, your petitioner filed a plea to the jurisdiction of the Court and a general demurrer on the ground that the issues arising from the facts alleged were exclusively cognizable in a court of admiralty jurisdiction, and that the Workmen's Compensation Law of Texas was not applicable for the reasons above set forth.

At the close of the evidence and before the case was given to the jury your petitioner moved the Court to dismiss the cause for want of jurisdiction upon the same grounds.

In the trial court, a motion was also filed to set aside the verdict and judgment for similar reasons.

The same contentions were made in the Court of Civil Appeals of Texas and in the Supreme Court of Texas, as shown by the assignments of errors filed in such courts.

Short Statement of Facts.

O. O. Boudreaux was employed by the National Shipbuilding Company as a diver, and on April 17, 1920, was working in the waters of the Sabine River, a navigable stream between Texas and Louisiana. In the full equipment of a diver, he went to the bottom of the river from a floating barge, which was about thirty-five feet from and not connected with the shore, to remove an obstruction to navigation, namely, a part of a set of ways which had formerly been used for launching ships. There was some testimony to the effect

that a portion of the ways was being removed in order to make room for the extension of a wharf.

The life line and air hose attached to the floating barge constituted Boudreaux's only connection with the outside world, and, while so engaged, the plaintiffs alleged and evidence was offered tending to prove that in some manner the supply of air became fouled or was cut off, so that he died of suffocation.

Upon such facts, the Texas courts permitted a recovery by respondent, decedent's sister, who the jury decided was partly dependent upon decedent for support, under the Workmen's Compensation Law of Texas.

Provisions of Workmen's Compensation Law of Texas.

The Texas courts took judicial notice of, and in this case the Supreme Court of the United States will, of course, take judicial notice of, the provisions of the Workmen's Compensation Law of Texas, which will be quoted in petitioner's brief on the merits.

Speaking generally, the Texas law, known as the Act of March 28, 1917, chapter 103, and also Articles 5246–1 to 5246–91 of Vernon's Sayles' Texas Civil and Criminal Statutes, 1918 Supplement, undertakes, in certain master and servant cases, to abolish the common-law defenses of contributory negligence, fellow-servant, and assumed risks, but creates an "Industrial Accident Board," which is given exclusive power to administer the law, which provides for compensation, in accordance with schedules therein prescribed, for injuries to and death of employees, irrespective of any negligence on the part of the employer.

The law also creates the "Texas Employers' Insurance

Association," to which any employer of labor in the State may become a subscriber, but the employer is given an option to insure his liability to pay compensation by taking out a policy with an insurance company, "which term shall include mutual and reciprocal companies." (As above stated, petitioner is a mutual reciprocal insurance association.) Employers who subscribe to the association or take out insurance cannot be sued for damages by injured employees, but such employees must look for compensation solely to the association or insurance company.

The law also provides that any interested party who is not willing to abide by any final decision of the Industrial Accident Board may file suit "in some court of competent jurisdiction in the county where the injury occurred to set aside" the award of the Board.

In the present case, the Board denied the application of Mrs. Braud for compensation, whereupon she, with the other original plaintiffs, filed suit to set aside the Board's ruling and to recover compensation under the law. As above stated, Mrs. Braud succeeded in obtaining a judgment for the compensation provided for by the Workmen's Compensation Law.

Authorities.

The opinion and judgment of the Supreme Court of Texas, affirming the judgment in favor of Mrs. Braud for compensation under the Texas law, are directly contrary to the decisions of the Supreme Court of the United States in the cases of:

Southern Pacific Co. *v.* Jensen, 244 U. S., 205;

Knickerbocker Ice Co. *v.* Stewart, 253 U. S., 149;

State of Washington *v.* Dawson & Co., 264 U. S., — (decided Feb. 25, 1924);

Panama R. R. Co. *v.* Johnson, 264 U. S., — (decided April 7, 1924),

and other cases, which will hereafter be reviewed in petitioner's main brief upon the merits.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued by this Court, directed to the Supreme Court of the State of Texas, and that the judgment of said Supreme Court of Texas in this case be reversed by this Honorable Court.

If this petition is granted, petitioner further prays that the certified copy of the record already on file in this Court upon the writ of error may be treated as a return to the writ of certiorari.

Respectfully submitted,

G. BOWDOIN CRAIGHILL,
HANNIS TAYLOR, JR.,
Attorneys for Millers Indemnity Underwriters, Petitioner.

J. B. MORRIS,
J. AUSTIN BARNES,
Of Counsel.

To Messrs. HOWTH & O'FIEL and M. G. ADAMS,
Attorneys for Respondent,
Beaumont, Texas:

Please take notice that the petitioner will submit the foregoing petition for certiorari and a copy of the whole record in the case to the Supreme Court of the United States, at Washington, D. C., upon the convening of the Court on Monday, October 6, 1924, or as soon thereafter as counsel can be heard, a copy of the petition being delivered to you herewith.

G. BOWDOIN CRAIGHILL,
HANNIS TAYLOR, JR.,
Attorneys for Millers Indemnity Underwriters, Petitioner.

Service of the foregoing notice, together with a copy of the petition for writ of certiorari, is hereby acknowledged this — day of —, 1924.

HOWTH & O'FIEL AND
M. G. ADAMS,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 124

MILLERS INDEMNITY UNDERWRITERS,
PLAINTIFFS IN ERROR,

vs.

MRS. NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD), DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

G. BOWDOIN CRAIGHILL,
HANNIS TAYLOR, JR.,
J. AUSTIN BARNES,
Attorneys for Plaintiffs in Error.

J. B. MORRIS,
Of Counsel.

SUBJECT INDEX.

List of Cases.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 124

MILLERS INDEMNITY UNDERWRITERS,
PLAINTIFFS IN ERROR,

vs.

NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD), DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

FEDERAL QUESTION INVOLVED.

This is a writ of error granted by the Supreme Court of Texas to review its judgment and decision overruling the contention, which was urged by plaintiffs in error in the trial court as well as the appellate courts of Texas, that upon the undisputed evidence this case is based upon an alleged *maritime tort* which is cognizable exclusively in a

court of admiralty under Article 3, Section 2, of the Constitution of the United States, and that the State courts of Texas had no jurisdiction of this cause under the Texas Workmen's Compensation Law, or otherwise; and further that the Texas Workmen's Compensation Law is invalid under the Constitution of the United States in so far as an attempt is made to apply it to this admiralty or maritime cause of action, and in rendering judgment against plaintiffs in error under such law the Texas courts violated the Fourteenth Amendment, as well as Article 3, Section 2, of the Constitution of the United States.

Facts.

The facts are, briefly, that on April 17, 1920, O. O. Boudreaux and his fellow-workmen were working for the National Shipbuilding Company near Orange, Texas, on and from a boat or barge about twelve feet wide and eighteen feet long, with an eight-by-ten cabin on it, on which barge were carried and transported equipment, tools, appliances, and material for submarine diving operations. The barge had no means of self-propulsion, but was towed about from place to place on the waters where work was to be performed. On the occasion in question, O. O. Boudreaux and the other members of the crew on said boat were engaged in removing an obstruction to navigation, to wit, an abandoned set of ways from the bed of the Sabine River, a navigable stream forming the

boundary line between the States of Louisiana and Texas.

His foreman in charge of the work, L. J. Kerr, testified:

> "I was in charge of the work Mr. Boudreaux was doing. He was a diver. * * * As to the nature of the work he was doing, it was a set of ways that was formerly used for launching ships and the National Shipbuilding Company decided to do away with that set of ways, or part of it, a hundred feet of it, in order to extend the wharf, and we were dismantling and cutting out those ways. There was no boat on those ways, the last one had been launched on that set of ways. We were dismantling them in order to extend the wharf so as to dismantle some boats the National Shipbuilding Company had bought. Yes, sir, we were taking those out to get the boats in. Yes, sir, that was an obstruction to navigation, and we were taking the obstruction away" (Record, pp. 56-57).

The barge from which Boudreaux was working had been towed out from shore into the river about thirty-five feet, and Boudreaux had donned the full equipment of a diver and had submerged himself from the barge to the bed of the river, taking with him a cross-cut saw to remove the timbers from the bed of the river. The other members of the boat's crew were pumpers and a tender, the pumpers working the air pumps to force air down to the diver's suit, while the tender held the life line con-

nected to the diver, by means of which signals were given and communication had with the diver. The only connection the diver had with the outside world was his life line and air hose, which were connected with the barge. The barge was not attached to or connected with the bank of the river in any way, but was held by its anchor and was floating on the waters of the river. While so engaged, the plaintiff alleged, and evidence was offered tending to prove, that in some manner the supply of air became fouled or was cut off from the said O. O. Boudreaux so that he died of suffocation.

Upon such state of facts, the Industrial Accident Board of Texas denied a recovery, but the Texas courts permitted a recovery by respondent, decedent's married sister, who, the jury decided, was partly dependent upon decedent for support, under the Workmen's Compensation Law of Texas.

Texas Compensation Law.

The Texas Compensation Law, known as the Act of March 28, 1917, Chapter 103, also found in Articles 5236-1 to 5246-91 Vernon's Sayles' Texas Civil and Criminal Statutes, 1918 Supplement, is substantially copied from the Workmen's Compensation Law of Massachusetts, and substitutes for the common-law rules of substantive and adjective law in master and servant cases, with few exceptions not material here, an Industrial Accident

Board to adjudicate and a schedule of weekly payments to compensate injured industrial employees and the beneficiaries of deceased employees. Section 3, Part I of the Act provides:

> SEC. 3. The employees of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association as the same is hereinafter provided for: *Provided*, that all compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of action and no such compensation and no part thereof or of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void."

The employees of a subscriber do not contribute to the fund provided for their protection, nor are they parties to the arrangement except by operation of the law which deprives them of all their common law rights. The employer simply takes out a policy of insurance on his employees, the policy providing that the insurance company will pay the compensation prescribed by law. The remedy is independent of agreement. The National

Shipbuilding Company, the employer of decedent, was a subscriber under the above-mentioned law, and the plaintiff in error was the compensation insurance carrier.

Decision of Supreme Court of Texas.

The Supreme Court of Texas, in deciding this case, said (Rec. 121-123):

> "The cause of action here is not predicated primarily upon a tort, on the contrary it grows directly out of the contract of employment between the parties, upon the theory that the compensation law of the State is read into and becomes a substantial part of this contract. The element of wrongdoing does not enter into the question of compensation. It follows, therefore, that the present case must be tested by the principle applicable to contract matters; and the question of admiralty jurisdiction must be determined by the subject-matter of the contract—the nature and character of the work being done. Grant-Smith Porter Ship Company *v.* Rhode (257 U. S., 469)."
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> "At the most the contract under consideration here did not go beyond what has been termed "maritime and local in character." As an illustration of what is meant by such a contract we call attention to the case of Grant Smith-Porter Ship Co. *v.* Rhode, *supra.*
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> * * * * * * *

> "This rule of giving application to the State compensation laws in cases which are maritime but local in character has recently been applied in several cases; and if it be conceded that the employment here partakes somewhat of a maritime nature, yet if the general employment contracted for and the work being done did not have a direct relation to navigation or maritime commerce, then the State court had jurisdiction and the compensation law was applicable. State Ind. Com. *v.* Nordenholt Corp., 259 U. S., 263."

Federal Question Was Properly Raised and Preserved.

Plaintiff in error denied all liability when claim was made by defendant in error before the Industrial Accident Board, which decided in favor of plaintiff in error (Rec. 4). Upon institution of the suit in the District Court of Orange County, Texas, plaintiff in error filed a plea to the jurisdiction of the Court and a general demurrer on the ground that the issues arising from the facts alleged were exclusively cognizable in a court of admiralty jurisdiction, and that the Workmen's Compensation Law of Texas was not applicable for the reasons above set forth (Rec. 5-6).

At the close of the evidence and before the case was given to the jury plaintiff in error moved the Court to dismiss the cause for want of jurisdiction upon the same grounds (Rec. 7).

In the trial court, a motion was also filed to set aside the verdict and judgment for similar reasons.

The same contentions were made in the Court of Civil Appeals of Texas and in the Supreme Court of Texas, as shown by the assignments of errors filed in such courts (Rec. 71-76; 105-107).

Specification of Error.

As more fully set forth in the assignments of errors (Record, pp. 134-136), the Supreme Court of Texas erred in holding that the District Court of Orange County, Texas, had jurisdiction of this cause.

ARGUMENT.

Texas Courts Did Not Have Jurisdiction.

The plaintiff in error contends that the State District Court of Texas did not have jurisdiction of this cause, and urges in support of its contention:

Under the facts of this case, the cause of action was that of a maritime tort, cognizable in admiralty and over which the State courts of Texas had no jurisdiction either under the Workmen's Compensation Law or otherwise.

The Supreme Court of Texas bases its decision upon what counsel believes to be an erroneous construction of the opinion of the United States Supreme Court in the case of *Grant-Smith Porter Ship Company vs. Rhode*, 257 U. S., 469. While

conceding that this cause of action, if considered as a tort action, partakes of an admiralty nature, yet the court concludes from the above opinion that the *State court* may assume jurisdiction of an admiralty cause of action and apply to it local statutes as long as such statutes do not work material prejudice to the general characteristics of the maritime law. The opinion in *Grant-Smith Porter vs. Rhode* did not so hold, as is plainly shown in the later case of *The State of Washington vs. W. C. Dawson & Co.*, 264 U. S., 219, and the case of *Frank Gonsalves vs. Morse Dry Dock & Repair Co.*, 266 U. S., 171. The Supreme Court of the United States has never held that a *State court* may assume jurisdiction over causes of an admiralty nature. What it has held, if counsel properly construes its opinions, is that a *court of admiralty*, under certain circumstances, may apply to an admiralty cause of action local regulations.

and apply to such causes a State compensation law.

If this case could be disposed of upon the theory that the cause of action grows out of the contract of employment, there would be no basis for the decision of the Supreme Court of the United States in *Southern Pacific Company vs. Jensen*, 244 U. S., 205. The primary cause, which is, after all, the basis of the cause of action in this cause, is the death of the diver, O. O. Boudreaux, which death was occasioned by a tort committed upon navigable water while the deceased was engaged in work of a maritime nature. The reason the compensation law cannot apply to a cause of an admiralty nature is

that the admiralty law is an exclusive branch of Federal jurisprudence which covers maritime torts. Now, if we could say that the cause of action under a Workmen's Compensation Act which is occasioned by a maritime tort is based upon the contract of employment into which there is read the compensation law, then there would be no basis for any of the decisions of the Supreme Court of the United States holding that the compensation law of the different States cannot supersede the admiralty jurisdiction of the Federal courts. As we said before, the body of admiralty laws is a distinct branch of jurisprudence. The Constitution of the United States gave that branch of jurisprudence to the Federal courts. The rights and remedies under the admiralty law are defined by the ancient customs and usages relating to matters pertaining to the sea. The compensation law of the State seeks to substitute for those ancient customs and usages an altogether different scheme of recovery, as well as an entirely different body of laws. The compensation law cannot substitute its measure of damages, if you can call it a measure of damages, for the right of maintenance and cure given to an injured person by the rules of admiralty. No matter whether you consider the cause of action as predicated upon the contract of employment or whether you consider it as predicated upon the tort, if the tort occurred upon navigable waters, the locality of the tort fixes the jurisdiction.

The Legislature of a State cannot do indirectly

that which it is not permitted to do directly by virtue of the admiralty clause of the Constitution of the United States; neither can the State courts, by construction infringe upon the Federal jurisdiction in admiralty. If we could say that this cause of action is predicated upon the contract of employment, which is governed by the Workmen's Compensation Act, then in every cause of an admiralty nature the court could say that the cause of action is not predicated primarily upon a tort, and in that manner the jurisdiction of the Federal courts in admiralty would be entirely defeated, by doing indirectly what could not be done directly. It is a well-settled principle that the Legislature of Texas cannot make a rule of law governing the rights and liabilities covered by the admiralty law. Since the Legislature cannot do that directly, it certainly has no power to pass a compensation law based upon the contract of employment between the parties which would supersede the ancient customs and usages of admiralty. The compensation law provides an exclusive remedy. It provides that when a person is injured who is covered by this compensation law he must take the compensation provided by the law, and the law furnishes his exclusive remedy. He cannot sue his employer as at common law; neither can he sue in admiralty or elsewhere. It is readily seen, therefore, that if this scheme of compensation should be applied to matters of admiralty, there would be as many different schemes of compensation within the United States

as there are States. It would destroy that uniformity provided by the admiralty law, which is so essential to the general application of the admiralty laws to maritime matters.

The Federal admiralty courts have sometimes found it expedient to enforce *in an admiralty court* a local statute with reference to the survival of a cause of action, the period of limitation, and few other special statutes. It will be seen, however, from an examination of the cases that these local laws are enforced in an admiralty court. A State court is without power to apply any kind of a law to a matter of maritime cognizance. In this case, so far as the question to be decided is concerned, it is immaterial whether or not the compensation law could be applied to this cause of action on the ground that it is of a local nature, because it is a matter of maritime cognizance, and the court below lacked inherent power to hear and to determine the cause.

Provisions of Federal Constitution and Statutes.

Article III, Section 2, of the Constitution of the United States provides that "The judicial power shall extend * * * to *all* cases of admiralty and maritime jurisdiction."

The provisions of Section 9 of the Judiciary Act of 1789 (1 Stat., 76), granting to the United States District Courts "*exclusive* original cognizance of all civil causes of an admiralty and maritime juris-

diction * * * saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it," was carried into the Revised Statutes, Sections 563 and 711, and thence into the Judicial Code, Sections 24 and 256.

By adopting the Constitution of the United States, all admiralty jurisdiction was transferred to the Federal courts; hence this cause of action, being of a maritime nature, which is admitted in the opinion of the Supreme Court of Texas, the jurisdiction is in the Federal court; and if the compensation law is to apply, or if any other law is to apply, the remedy must be pursued in a Federal court having jurisdiction of an admiralty cause of action.

This case is further distinguished from the *Grant-Smith Porter* case in that in the *Grant-Smith Porter* case the employee and employer both contributed to the compensation fund, both became parties to the contract, while in the present case Boudreaux contributed nothing to the fund nor were he or his beneficiaries parties in any sense to the policy of compensation insurance carried by the employer who became a subscriber under the law and paid all the premiums for the protection the law afforded him. This insurance policy covered only the liability imposed by the law, and as the law is invalid as applied to causes of an admiralty nature, such accidents are not covered by the policy.

The courts of Texas have held the Texas compensation law invalid as applied to causes of an

admiralty nature. See *Home Life and Accident Company vs. Wade*, 236 S. W., 778, where it is held that:

> "An employee injured while on a derrick barge in the Sabine river, assisting in loading cranes, is not entitled to compensation under the Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246*h*-5246*nn*); his cause of action, if any, being within the admiralty jurisdiction of the Federal courts."

The accident was not caused by the contract of employment at all, nor did the contract of employment have anything to do with the cause of the accident. The basis of the cause of action is the death of Boudreaux caused by suffocation, a tort, not a contract, occurring and effective upon navigable waters, and the place where the tort was committed determines the jurisdiction.

While Boudreaux was not actually on the boat at the time the tort was committed, yet he was attached to and working from the boat and engaged in submarine diving operations in a navigable stream, removing from such stream an obstruction to navigation. At the time of his death he was engaged in a maritime employment.

This cause of action is a maritime tort within the meaning of this court when it stated in *Atlantic Transport Company vs. Imbrovek*, 234 U. S., 52:

> "To constitute a maritime tort, it is not indispensable that there must be either an

> injury to a boat, or an injury by the negligence of a boat or her owners or mariners. A court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect and produces injuries to the person or property of another on navigable waters."

While counsel realizes that an opinion of a State court is not binding on the Supreme Court of the United States, yet when such an opinion is based upon sound reasoning and is in accord with numerous decisions of the Supreme Court of the United States, it should be highly persuasive. Such is the opinion in *De Gaetno vs. Merrett and Chapman Derrick and Wrecking Company*, 196 N. Y. Sup., 195. The facts are almost identical with the facts of the case under consideration, and we quote from the opinion as follows:

> "The question here is whether or not the deceased was engaged in maritime employment. The State Industrial Board has held that he was not. The facts are undisputed. The deceased was a member of the crew of a scow, equipped as a floating derrick with a hoisting engine, and engaged generally in the wrecking business. It was also equipped with an air compressor for supplying air to divers operating from the vessel in subaqueous work. It was registered as a vessel with the United States custom house, and was towed at times to various places along the coast in the vicinity of New York City. At the time of the accident on August 29,

1921, it was made fast to a dock on the Harlem River and on concededly navigable waters.

"The duties of the deceased were those of deck hand and diver, principally the latter. On the day in question the vessel was being used to aid in laying an electric submarine cable from shore to shore of the river. The deceased was working as a diver. He dressed for diving on the vessel, and entered the water from the boat. His diving outfit was connected by an air tube to the air compresser, which was a part of the equipment of the boat. His particular work at the time was to stand on the bottom of the river, where he guided the cables through a hole in the bulkhead as they were pulled through the dock.

"While the diver was under water, the engineer of the scow operated the engine so as to furnish air to the air compressor tank, and a deck hand, standing aboard the boat, handled the tube running from the tank to the helmet of the diver, regulating the amount of air supply furnished to the latter, and signaling to the engineer to operate the engine when necessary. While the deceased was so working under the water, the air, in some unexplained manner, was cut off, causing his death.

"We think this case comes within the reasoning of this court in the case of Norman *v.* Merrett & Chapman Derrick & Wrecking Co., 200 App. Div. 360, 193 N. Y. Supp. 195. The deceased was one of the crew of a vessel and at the time of his accident was engaged

in the very service for which the vessel was equipped and operated. He was a 'seaman,' actually attached to the vessel at the time through the instrumentality of the diver's uniform, the air tube, the compressor tank, and the engine of the boat, all of which were being simultaneously operated as equipment of the boat by himself, the deck hand, and the engineer as members of the crew. The nature of the scow's employment at the time is not material, since he was a seaman of a vessel, and he was constructively on the vessel, doing the work of the vessel under a maritime contract. The mere fact that his feet were touching the land under the water did not change the essential character of the operation, which consisted of the use of a vessel and its appliances and crew; the work of the deceased being an integral part of such operation. It was not an accident on land within the authority of State Industrial Commission *v.* Nordenholt Corporation *et al.* (recently decided by the United States Supreme Court), 259 U. S. 263.

"The award should be reversed, with costs against the State Industrial Board, and the claim dismissed. All concur except Hasbrouck, J., who dissents."

It is respectfully submitted that the above case is directly in point. The facts are practically identical. Both divers were working from a barge. Both divers were members of the crew engaged in maritime employment on the waters of a stream. Both were conceded to be navigable streams. The

barge from which Boudreaux was working went from place to place on the river transporting the machinery, equipment, materials, and tools necessary for performing its duties in connection with the navigation of the stream, just as the barge did in the *De Gaetano* case. It was contended in the *De Gaetano* case that the cause was not of an admiralty nature because the workman was standing on the bottom of the river. In both cases he was attached to the barge from which his life line and air hose came, and that was his only means of communication with the outside world. In the *De Gaetano* case the diver was assisting in laying a cable; in the case under consideration Boudreaux was engaged in removing an obstruction to navigation. Both were engaged in a maritime employment and in both cases the accident occurred in navigable waters. We respectfully submit that the cases are identical on the facts, and that the *De Gaetano* case was correctly decided.

The barge or boat upon which Boudreaux was employed and to which he was attached at the time of his death was a vessel as the term "vessel" is used in admiralty: "The word 'vessel' includes every * * * water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Revised Statutes U. S., Sec. 3 (Comp. St., Sec. 3); and "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a

'seaman.'" Rev. St. U. S., Title 53, Section 4612, as amended by 30 Stat. 762, C. 28, Section 23, and 38 Stat., 1168, C. 153, Sec. 10 (Comp. St. sec. 8392).

In this case Boudreaux's services had immediate connection with the vessel, itself. In *Ellis vs. United States*, 206 U. S., 246, it was held that all employees on scows were seamen, and, therefore, were not laborers and mechanics within the provisions of the Federal Eight Hour Law of 1892 (27 Stat., 340 C. 352; U. S. Comp. St., Sections 8912-8920), notwithstanding the fact that in the correlated cases reported with that case it was strongly urged by Justice Moody, dissenting, that the men who were engaged in the work of excavation on the scows or dredges had nothing whatever to do with navigation.

In re Eastern Dredging Co. (D. C.), 138 Fed., 942, involved a scow employed in carrying mud. In that case, construing section 4283 of the United States Revised Statutes and the provisions of the Act of 1886 (24 Stat., 80, Section 4, amending U. S. R. S., Section 4289 (U. S. Comp. St., Section 8027), the court said:

> "There is no expression in the act, as it now stands, to indicate that the nature of the employment in which a vessel is engaged is to be considered in determining whether or not the act is to apply to her. That question is made to depend entirely upon the waters whereon she is used. The water whereon the petition alleges this scow to have been used are unquestionably waters within the ad-

> miralty jurisdiction, and, having held her to be a vessel within the meaning of the act, I am unable to regard the nature of her employment as in any way material." 138 Fed. 945.

A case quite parallel to that before us is *The Sunbeam*, 195 Fed., 468; 115 C. C. A., 370. It appears that the *Sunbeam* was a scow, built for carrying stone. It carried a derrick. The vessel had been engaged in carrying stone about the harbor of New York, unloading the same at places where sea walls were being built and riprap work was being done. "She had not carried cargo for three years, but was capable of doing so, and at the time in question was anchored in the harbor of New York, about 300 feet from the shore at Bay Ridge." Apparently the scow was being employed in some harbor work for the city of New York, and an inspector of that city was injured by being struck by a stone which was being handled by the derrick of the *Sunbeam*. It was held that the owners of the scow could limit their liability under the statute of 1886, "which relates to all vessels by whatever name they may be known;" the court saying:

> "It includes barges, canal boats, scows and lighters."

The barge or boat from which Boudreaux was working was used to transport her crew and their materials, tools, appliances, and equipment from place to place on the water wherever they were engaged in submarine diving operations.

It follows that since this is a cause of action of an admiralty and maritime nature, the Texas courts had no jurisdiction under the Texas Workmen's Compensation Law or otherwise; that the Texas Workmen's Compensation Law is invalid under the Constitution of the United States in so far as an attempt is made to apply it to this admiralty or maritime cause of action, and that in rendering judgment against plaintiff in error under such law the Texas courts violated the Fourteenth Amendment as well as Article III, Section 2, of the Constitution of the United States.

Southern Pacific Company vs. Jensen, 244 U. S., 205;
Peters vs. Veazy, 251 U. S., 121;
Atlantic Transport Co. vs. Imbrovek, 234 U. S., 52;
Kincherbocker Ice Co. vs. Stewart, 253 U. S., 149.

Conclusion.

Plaintiff in error respectfully submits that upon the undisputed evidence this case is based upon an alleged maritime tort which is cognizable exclusively in a court of admiralty under Article III, Section 2, of the Constitution of the United States; that the Texas courts had no jurisdiction of this cause of action under the Texas Workmen's Compensation Law or otherwise; that the Texas Workmen's Compensation Law is invalid under the Con-

stitution of the United States in so far as an attempt is made to apply it to this admiralty or maritime cause of action, and that in rendering judgment against plaintiff in error under such law the Texas courts violated the Fourteenth Amendment as well as Article III, Section 2, of the Constitution of the United States.

Wherefore plaintiff in error prays that the judgment of the Supreme Court of Texas be reversed, with an instruction to reverse the judgments of the Court of Civil Appeals and of the District Court of Orange County, Texas, and to instruct the latter court to dismiss the cause for want of jurisdiction.

Respectfully submitted,

G. Bowdoin Craighill,
Hannis Taylor, Jr.,
J. Austin Barnes,
Attorneys for Plaintiffs in Error.

J. B. Morris,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1925

No. 124

MILLERS INDEMNITY UNDERWRITERS
PLAINTIFFS IN ERROR

vs.

MRS. NELLIE BOUDREAUX BRAUD
(MRS. E. J. BRAUD)
DEFENDANT IN ERROR

BRIEF FOR DEFENDANT IN ERROR

C. W. HOWTH,
M. G. ADAMS,
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Attorneys for Defendant in Error.

INDEX

AUTHORITIES

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BRIEF FOR DEFENDANT IN ERROR

OBJECTION TO CONSIDERATION OF BRIEF FOR PLAINTIFF IN ERROR.

Defendant in error objects to the consideration of said brief because it is not in substantial compliance with Sub-section 2 of Section 2 of Rule 21 of this Court, same being of the tenor following:

> "The brief shall contain a specification of errors relied on, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged."

As shown under the heading of "Specifications of Error" on page 8 of said brief, the specifications of errors are not therein set out, but the Court is merely directed where to find them in the record.

REPLY TO ARGUMENT OF PLAINTIFF IN ERROR.

This argument is based upon a syllogism, both the major and minor premises of which are palpably erroneous. It begins with the proposition that the Constitution gives the Federal Courts exclusive jurisdiction of all Admiralty and maritime cases; and the next step in the erroneous reasoning is the unsupported assertion that this particular case is maritime, within the legal signification of that term. Neither of these propositions is legally accurate.

In the first place, the said Constitutional provision must be considered in its historical setting. The Common Law Courts always had jurisdiction of the cause of action against the shipowner in contract or in tort when he could be reached personally and when money damages were demanded. That right was not taken away by the grant in the Constitution; but the right also to hear such cases, as well as other cases of admiralty jurisdiction, was given to the newly constituted Federal judiciary. The jurisdiction of the Admiralty and Common Law Courts is, therefore, to a certain extent, concurrent. The Common Law jurisdiction, when concurrent with Admiralty jurisdiction, may be exercised by State Courts or, within the limitations of the Constitution and the Acts of Congress, by the United States District Courts on the Common Law side. (Benedict on Admiralty, Vol. 1, 5th Ed. Sec. 20; 3 Story Com.

Const. Sec. 1666; Taylor vs. Carrul 61 U. S. (20 How) 583, 15 L. Ed. 1028). We quote from Story, supra:

> "The reasonable interpretation would seem to be that it conferred on the national judiciary the Admiralty and maritime jurisdiction, according to the nature, extent and modification in which it exists in the jurisprudence of the Common Law. When the jurisdiction was exclusive it remains so; when it was concurrent, it remains so. Hence, the States could have no right to create Courts of Admiralty as such, or to confer on their own Courts the cognizance of such cases as were exclusively cognizable in Admiralty Courts; but the States might well retain and exercise the jurisdiction in cases of which the cognizance was formerly concurrent in the Courts of Common Law. The latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law."

The judiciary act which, in 1789, established the United States Courts and defined their jurisdiction, is a contemporaneous construction of the Constitution and confirmed the existing right of the Common Law Courts by providing that the United States District Courts should have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" etc. "saying to suitors in all cases, the right of a common law remedy where the common law is competent to give it." The common law remedy thus saved to suitors, is the right to proceed in personam against the defendant, which remedy the common law is competent to give. Therefore, a direct suit against a shipowner, for instance, to recover seaman's wages, or damages for collision, or for breach of charter, or for other personal demand, where jurisdiction of the person of the defen-

dant can be secured, may be brought either in admiralty or at common law; the two Courts having, in this respect, concurrent jurisdiction. (Leon vs. Galceran 78 U. S. 185; Shoonumaker vs. Gilmore, 102 U. S. 118; Belden vs. Case 150 U. S. 674). Moreover, the common law Court may entertain a suit on a formal contract for the agreed price, or on an implied contract for the reasonable value of the work, labor and services in the recovery of a vessel, but it does not take into account the elements of peril, hardship and bravery which are considered and rewarded by the Admiralty Courts in salvage cases. (Merritt etc. Company vs. Tice, 79 N. Y. Supp. 120, 103 N. Y. Supp. 333). Further, a State law may authorize appropriate proceedings in the State Courts to compel specific performance of an arbitration clause in a maritime contract, for such legislation does not purport to modify the substantive maritime law or the remedy in Courts of Admiralty. (Red Cross Line vs. Atlantic Fruit Co., 264 U. S. 109).

The foregoing are merely a few of almost innumerable instances where the State Courts can properly take cognizance of what may be properly termed true admiralty and maritime matters. It follows, therefore, that there is a particular zone given to both the admiralty and common law Courts, wherein each can legally take jurisdiction. Therefore, not all admiralty and martime matters are exclusively cognizable in the Federal Courts, as alleged in the major premise of plaintiff in error's reasoning.

Not only so, but the matter or cause of action in the instant case does not properly come within the class of causes legally maritime or admiralty. The Courts have, in many instances, said whether certain particular con-

troversies were maritime or not, but no satisfactory definition has yet been formulated, or, at least, enunciated, which will be a safe guide or criterion to determine whether a given case is maritime or not. In De Lovio vs, Boit, 2 Gal. 398, Fed. Cas. No. 3776, Mr. Justice Story says that maritime matters included "all transactions and proceedings relative to commerce and navigation, and all contracts that relate to the navigation, business or commerce of the sea." If the subject matter of the contract concerned the navigation of the sea, it is a case of admiralty and maritime jurisdiction. (Zane vs. The President, 11 Wall. 1, 20 L. Ed. 90).

TEST OF WHETHER A CERTAIN MATTER IS MARITIME FOR PURPOSE OF DETERMINING JURISDICTION.

Such test of jurisdiction is different as to tort or contract matters. The test in contract cases is the nature of the transaction. The test in tort cases is the locality. It is now definitely settled that the test in matters of contract is irrespective of locality and depends upon the nature of the transaction. (Grant-Porter Ship Co. vs. Rhode, 257 U. S. 469; State Ind. Com. vs. Nordenholt Corp. 259 U. S. 263; Western Fuel Co. vs. Garcia 257 U. S. 233).

Under the provisions of the Texas Compensation Law, which determined the rights of the parties to this cause, the element of tort or locality is wholly eliminated and constitutes no part of the cause of action, which rests entirely in contract among employe and employee and the insurer; the contract of insurance under the statute being for the benefit of the employee sustaining accidental injury in the course of his employment. The

employer and the insurer enter into a contract for the protection of the employer and the employees, having reference to the provisions of the statute which are read into and become a part of the contract of insurance. (Grant-Porter Ship Co. vs. Rhode 257 U. S. 469). This remedy, given by the Texas Compensation Statute, to the injured employee, where he and his employer voluntarily enter into such contractual arrangements, is exclusive of all other remedies and the tort element, together with full indemnity for negligence, is completely eliminated and expressly excluded.

Therefore, the test to be applied in this case to determine jurisdiction, is the said contract and its nature; and not to any extent the alleged tort and its locality. It follows, therefore, that the mere fact that Boudreaux, when he sustained his injuries resulting in death, was working as a diver on the bottom of the Sabine River in navigable water does not determine exclusive jurisdiction in admiralty, for the simple reason that this cause of action does not in any manner sound in tort but is based wholly on the contract. Therefore, to determine the true jurisdiction of this cause, it is necessary to look to the contract and the nature of the work being done. (See the Rhode and Nordenholt cases supra.)

THE NATURE OF THE CONTRACT AND THE WORK BEING DONE UNDER IT.

What was the nature and character of the work being done? This has been described with sufficient accuracy by opposing counsel in their brief. The ultimate material facts are that Boudreaux, in the employ of the National Ship Building Co., in the course of his em-

ployment undertook to remove some piling, part of the ways formerly used by the Company in launching boats built by them. He was sent down into the waters of the Sabine River in the full equipment of a diver from a small boat, which was without means of self-propulsion, having on it a small dressing room, pumps and other equipment. Boudreaux was working under the water about 35 feet from the bank of the stream, sawing off the piling, for which the Company no longer had any use, as the work of building and launching boats had terminated, and which were connected with the wharf or bank of the stream, and now being removed—to put it in its most favorable light for plaintiff in error—as a possible obstruction to future navigation and commerce. This work had no direct relation to, or connection with, either navigation or commerce.

In the Rhode case, which was based on the Oregon Compensation law, in all respects similar to that of Texas, this Court said:

> "Neither Rhode's general employment nor his activities at the time had any direct relation to navigation or commerce."

And this was so held though Rhode at the time, was a carpenter engaged in finishing the almost completed vessel which had been already launched in navigable waters. Certainly his work which was being done in completion of a launched vessel about to be placed in actual commercial navigation, had decidedly more direct and immediate relation to navigation and commerce than did that of Boudreaux in removing piling to prevent possible obstruction to some future navigation and commece. Still quoting from this Court's decision in the Rhode case:

"In certain local matters, regulation of which would work no material prejudice to general maritime law, the rules of the latter might be modified or supplemented by state statutes."

The present case is controlled by that principle.

As pointed out by the Supeme Court of Texas in its decision in this case (261 S. W. 138):

"The work being done by Boudreaux was on the ways constructed for launching ships. The ways are constructed by driving piling from the bank out into the river and are simply appurtenent to or a necessary part of the docks or wharf. They are merely a continuation or extension of the land structures which are used in connection with the construction of vessels and their launching. The case of Cleveland Ter. & Valley R. R. Co. vs. Cleveland S. S. Co., 208 U. S. 316, bears on this question. That was a suit for damages to dock, pier, piling, etc., and in discussing the matter of jurisdiction the Court said: 'The shore docks, protection piling, piers, etc., appertain to the land. They were structures connected with the shore and immediately concern commerce on land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such. (Sou. Lighterage Co. vs. U. S. 284 Fed. 978, Aff. 260 U. S. 699, holding that a group of piles in the Mississippi River at the foot of a street in New Orleans, used for mooring of vessels or keeping them in deep water while unloading, were a land structure and not an aid to navigation, and a suit for injury to them was not within admiralty jurisdiction.)"

But while the proper jurisdiction of this case is actually determined on the principle of contract and on the nature of the work being done, yet, if the Texas Com-

pensation Law were eliminated and the cause of action regarded as being founded on tort, this, under the decisions and principles of law above set forth, would not bring this cause within the exclusive admiralty jurisdiction but would merely have the effect of bringing it within that large class of causes of concurrent jurisdiction of the Admiralty and Common Law Courts. This brings us, in the last analysis of the principles applicable to the facts of this case, to the truly distinguishing features that control its jurisdiction, to-wit:

1. Whether or not the said contract and the work being done had direct and immediate relation to navigation and commerce; and

2. Whether or not jurisdiction and cognizance of said cause in a State or Common Law Court, would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.

These ruling principles were definitely formulated and applied by this Court in the Rhode, Jensen and in various other cases growing out of the compensation laws of the several States; and the facts in the instant case are so pointedly analogous to those in the Rhode case, supra, as to be substantially and legally identical. In that case, this Court answered two questions certified by the United States Circuit Court of Appeals for the Ninth Circuit, and the answer to the second question was:

> "Assuming that the second question presents the inquiry whether, in the circumstances stated, the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the

right to recover damages in an admiralty Court, which otherwise would exist, we also answer, Yes."

Moreover, in that case, this Honorable Court held that the facts therein at issue, to-wit, a suit to recover compensation under the Workmen's Compensation Law of Oregon, originally brought in the United States District Court, involved a local matter the regulation of which by the State would work no material prejudice to the general maritime law or interfere with the proper harmony and unifomrity of that law in its intertional and interstate relations. If this was true in that case, a fortiori would it be true with respect to the facts of this case. Cognizance by the State Court cannot possibly touch or work material prejudice to the general maritime law; it cannot interefere with the proper harmony and uniformity of that law in its international and interstate relations; and, therefore, it cannot impinge upon the admiralty jurisdiction of the Federal Courts; and the full purpose of the constitutional grant to the Federal Courts and the limitation upon the State Courts as to admiralty and maritime causes would not be in anywise impaired. (Western Fuel Co. vs. Garcia 259 U. S. 233).

The foregoing principles and distinguishing features were clearly developed by this Court in S. P. Co. vs. Jensen, 244 U. S. 205. There a longshoreman was doing the work of unloading a vessel in navigable waters —a work directly connected with navigation and commerce; and substantially the same facts and principles were involved in Peters vs. Veasey, 251 U. S. 121.

The plaintiff in error cites the case of Home Life and Accident Ins. Co. vs. Wade, 236 S. W. 778, as holding that an employee injured while on a derrick barge

in the Sabine River assisting in loading cranes is not entitled to compensation under the Compensation Act of Texas. In this case the Supreme Court of Texas granted a writ of error, but never deeided the case for the reason that, before it was reached, it was settled and dismissed. This case was decided by the Court of Civil Appeals for the Ninth Supreme Judicial District at Beaumont, the same Court which originally passed upon the instant case (245 S. W. 1025) in which the Court, in remarking upon its decision in the Wade case, said:

> "In Home Life and Accident Co. vs. Wade, 236 S. W. 778, we recently applied the rule announced by the Supreme Court of the United States in the Jensen case, as we then understood it, and held that the cause of action as therein asserted was maritime in its nature and exclusively cognizable in a Court of admiralty. A writ of error was granted against our holding, after being dismissed by the Supreme Court for want of jurisdiction. Hence it would appear that our holding in that case was most carefully reviewed by our Supreme Court and after such a review the writ was granted. Since our decision in that case the Supreme Court of the United States has further discussed the relation of State Workmen Compensation Acts to the maritime law of the United States in Western Fuel Oil vs. Garcia 257 U. S. 233; Grant-Porter Ship Co. vs. Rhode, 257 U. S. 469; and Ind. Com. vs. Nordenholt 259 U. S. 263. We did not have these cases before us at the time we filed our opinion in the Wade case. As we now understand the question involved in appellant's proposition we do not think the Wade case was correctly decided, especially so in view of the fact that a writ was granted against our holding. Recently, in an opinion by the Chief Justice of this Court, in Lumber-

> men Reciprocal Ass'n vs. Adcock, 244 S. W. 645, we held that the Workmen's Compensation Act of this State covered injuries received while one, engaged in work on navigable waters, working from a small boat, was injured in his efforts to take sunken logs out of the water."

There may be serious question whether the Wade case was not properly decided in the first instance, for that, as it appears from the facts of that case, he was loading a barge on navigable waters which was destined for interstate commerce between Louisiana and Texas; and, it may be that the said work was thus directly connected with navigation and commerce, the same as the work of a longshoreman in loading and unloading a ship on navigable waters for such commerce.

We think that the Supreme Court of Texas has properly distinguished and disposed of those leading cases cited by plaintiff in error, involving rights of seamen as follows:

> "We have carefully considered the cases relied upon by the plaintiff in error, as well as many others. The cases of De Gaetano vs. Merritt Chapman Co., 203 App. Div. 259, 196 N. Y. Sup. 573, and Norman vs. Merritt Chapman Co., 200 App. Div. 360, 193 N. Y. Sup. 195, are easily distinguished from this case and those we have cited. In this case the persons who lost their lives were all held to be 'seamen' engaged in services upon a vessel as each of these terms have been defined by Federal statutes and decisions. We do not see how it can be seriously contended that in this instance Boudreaux could be considered a "seamen' or engaged in work upon or connected with a vessel."

So plainly and palpably is the instant case ruled by the principles applied by this Honorable Court in the Rhode case, supra, that we have filed a motion herein to tax the plaintiff in error 10 per cent additional for delay under Section 2 of Rule 23 of this Court, on the ground that it is manifest that the writ of error was taken for delay only.

WHEREFORE, defendant in error prays that the judgment herein of the Supreme Court of Texas be affirmed and that the plaintiff in error be taxed with an additional 10 per cent because the writ of error was taken for delay only and without meitorious ground; for all costs of this appeal; and for all such further relief to which defendant in error may be entitled in law or in equity.

Respectfully submitted,

C. W. Howth

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(4)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 124.

MILLERS INDEMNITY UNDERWRITERS, PLAINTIFFS IN ERROR,

vs.

NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD), DEFENDANT IN ERROR.

MOTION TO TAX 10% ADDITIONAL FOR DELAY.

To the Honorable the Supreme Court of the United States:

The motion of Mrs. E. J. Braud, defendant in error, respectfully shows to the Court as follows:

This suit was instituted in the District Court of Orange County, Texas, by defendant in error to set aside the award of the Industrial Accident Board of Texas denying compensation for the death of O. O. Boudreaux under the Texas Compensation Law. Judgment was entered by the District Court in favor of Mrs. E. J. Braud, which said judgment was affirmed by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont (245 S. W.,

1025). The Supreme Court of Texas granted writ of error therein and on full argument affirmed the judgment of said Court of Civil Appeals (261 S. W., 127).

The ultimate undisputed facts here material are: Said Boudreaux in the course of his employment as diver with the National Ship Building Company, sustained injuries while doing work in and under the navigable waters of Sabine River, cutting out timbers and dismantling the ways that had been formerly used in launching ships. He was doing the work from a barge or pontoon connected with and attached to the wharf. He was working under the water about thirty-five feet from the bank of the stream in a diving suit, the apparatus of which was connected with the barge, the wharf, and the land, and while thus doing the work of cutting out certain parts of the ways to prevent obstructing the river he died, as the evidence shows, from suffocation resulting from some defects in the appliances.

The work that Boudreaux was doing had no direct connection with, nor relation to, either navigation or commerce, but was being done merely for the purpose of clearing navigable waters of possible obstructions to future navigation.

Plaintiff in error contended that the action was one exclusively cognizable in a court of admiralty and that, therefore, the District Court of Orange County, Texas, had no jurisdiction, this contention being based on the proposition that, as applied to the facts of this particular case, the Compensation Law of the State of Texas was and is repugnant to that certain provision of the Constitution of the United States extending and granting Federal judicial power "to all cases of the admiralty and maritime jurisdiction" (being part of Section 2, Article 3, of the Federal Constitution).

The exact proposition urged by plaintiff in error in the State courts and here now being contended for in this Honorable Court was passed upon and adversely decided by this Court in the case of *Grant Smith-Porter Ship Company vs. Rhode*, 257 U. S., 469; 42 Sup. Ct., 157; 66 L. Ed., 321; 25 A. L. R., 1008, and in *State Ind. Com. vs. Nordenholt Corp.*, 259 U. S., 263; 42 Sup. Ct., 473; 66 L. Ed., 933; 25 A. L. R., 1013, both of which involved such pointedly analogous facts as to be in substance legally identical.

This is a clear case where a writ of error has delayed the proceedings on the judgment rendered in this cause in the Supreme Court of Texas, and it is palpably apparent that the said writ of error sued out in this Honorable Court was merely for delay; and, therefore, under and by virtue of Section 2 of Rule 23 of this Court, defendant in error is entitled to an award of damages at a rate not exceeding 10 per cent in addition to the legal interest.

Wherefore, under Section 5 of Rule 6 of this Court, defendant in error moves that the final judgment rendered in this cause by the Supreme Court of Texas be affirmed on the ground that it is manifest that the writ of error was taken for delay only, and that the question on which the decision herein depends is so frivolous as not to need further argument.

Respectfully submitted.

C. W. HOWTH,
DAVID E. O'FIEL,
M. G. ADAMS,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 124.

MILLERS INDEMNITY UNDERWRITERS, *Plaintiffs in Error,*

vs.

NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD),
Defendant in Error.

THE STATE OF TEXAS,
County of Jefferson:

Before me, the undersigned authority, on this day personally appeared M. G. Adams, who, being by me duly sworn, on his oath deposes and says that he is one of the attorneys for the defendant in error in that certain cause pending in the Supreme Court of the United States, No. 124, Millers' Indemnity Underwriters, plaintiffs in error, *vs.* Nellie Boudreaux Braud (Mrs. E. J. Braud), defendant in error, and that on the 30th day of December, 1925, he delivered to J. B. Morris and J. Austin Barnes, attorneys for plaintiff in error, a true copy of the motion of the defendant in error filed herein to tax, under the rules of the Supreme Court of the United States, the plaintiff in error with an additional sum of 10 per cent for delay.

M. G. ADAMS.

Sworn to and subscribed before me this 1st day of January, 1926.

[SEAL.] LUCILE HOLLAND,
Notary Public, Jefferson County, Texas.